

# ARKANSAS SUPREME COURT

No. 09-423

FRANK WATTS II  
Petitioner

v.

LARRY NORRIS, DIRECTOR,  
ARKANSAS DEPARTMENT OF  
CORRECTION, AND MARK CASHION,  
WARDEN, DELTA REGIONAL UNIT  
Respondents

Opinion Delivered      June 18, 2009

PRO SE MOTION FOR BELATED  
APPEAL [CIRCUIT COURT OF  
CHICOT COUNTY, CV 2007-48, HON.  
ROBERT BYNUM GIBSON, JUDGE]

MOTION TREATED AS MOTION FOR  
RULE ON CLERK AND DENIED.

## PER CURIAM

In 2007, appellant Frank Watts II filed a petition for writ of habeas corpus in Chicot County Circuit Court, seeking relief from a judgment entered in Pulaski County. The circuit court granted a motion for default judgment, but later granted a motion to set aside the default judgment and dismissed the petition. Appellant filed a motion to vacate the orders setting aside the default judgment and dismissing the petition and the court dismissed the motion through an order entered on July 3, 2008. Appellant filed a notice of appeal of the July 3, 2008, order in the circuit court on July 29, 2008. He now brings this motion for belated appeal of the order. The notice of appeal was timely and we treat the motion as a motion for rule on clerk to lodge the record rather than a motion for belated appeal. *Mitchem v. State*, 374 Ark. 157, \_\_\_ S.W.3d \_\_\_ (2008) (per curiam).

The time limit set forth in Arkansas Rule of Appellate Procedure--Civil 5(a) requires that the record must be tendered to this court within ninety days of the date of the notice of appeal, unless

the circuit court granted an extension of time. Petitioner seeks to proceed with his appeal although the record was not tendered within that time. He asserts that he is indigent, that his notice of appeal requested the record be transmitted to our clerk for filing, that the filing of his notice of appeal acted to advise the clerk to prepare the record, that the clerk was required upon request of the appealing party to transmit a copy of the record, and that the failure of the circuit court clerk to perform those duties was good reason to allow his appeal to proceed.

We need not consider petitioner's reasons for delay because it is apparent that he could not ultimately succeed if we were to permit his appeal to proceed. An appeal of the denial of postconviction relief, including an appeal from an order that denied a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam).

Here, petitioner indicated in his petition that he was incarcerated in Chicot County at the time he filed his petition. However, petitioner is now incarcerated in Lee County. Any petition for writ of habeas corpus to effect the release of a prisoner is properly addressed to the circuit court in the county in which the prisoner is held in custody, unless the petition is filed pursuant to Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated §§ 16-112-201 – 16-112-208 (Repl. 2006). *Id.* A proceeding under Act 1780 is properly commenced in the court in which the conviction was entered. Ark. Code Ann. § 16-112-201(a) (Repl. 2006).

The petition filed was not clear as to whether relief was requested under Act 1780, but Chicot County was not the court in which petitioner's judgment was entered. Nor does Chicot County now have jurisdiction to grant relief on a request for the writ that did not invoke Act 1780. A circuit court does not have jurisdiction to release on a writ of habeas corpus a prisoner not in custody in that

court's jurisdiction. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam) (citing *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991)). Chicot County Circuit Court does not now have jurisdiction to grant the relief petitioner sought. Even if the circuit court erred in dismissing the motion on the dismissal of the petition, appellant cannot prevail, and we will not therefore grant his request to permit the appeal to proceed.

Motion treated as motion for rule on clerk and denied.